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PHILIPPINE NATIONAL BANK

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

MERRILL LYNCH, PIERCE,
FENNER & SMITH
INCORPORATED,

Plaintiff,

v.

ARELMA, INC., et al.,

Defendants.

Case No. CVOO-00595 MLR

**STATUS CONFERENCE
STATEMENT OF DEFENDANTS
ARELMA, S.A. AND PHILIPPINE
NATIONAL BANK**

Date: September 10, 2008

Time: 10:00 a.m.

Judge: Hon. Manuel L. Real

**STATUS CONFERENCE STATEMENT OF DEFENDANTS ARELMA, S.A.
AND PHILIPPINE NATIONAL BANK**

This action is an interpleader filed by Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) concerning assets previously held by Merrill Lynch in New York in an account in the name of Arelma, a Panamanian corporation.

Merrill Lynch filed this action in the District Court in 2000 and thereafter deposited the assets in the Arelma account with the Clerk of the Court. The Amended Complaint named as defendants a number of parties who asserted claims to the assets. Those claimants include Arelma and Philippine National Bank (“PNB”). Arelma claims the interpleaded assets as their owner through its Board of Directors appointed by PNB, as escrow holder, following delivery to PNB of the bearer share certificates of Arelma pursuant to an order of the Swiss government. PNB claims the assets only on behalf of Arelma in its capacity as the shareholder of Arelma and the holder of a Power of Attorney executed by Arelma in favor of PNB.

In July 2004 the District Court entered a Judgment awarding the Arelma assets to defendant Mariano J. Pimentel (“Pimentel”) whose claim was based on a money judgment in favor of a class of “human rights victims” against the Estate of Ferdinand E. Marcos in prior litigation in the District of Hawaii known as MDL No. 840. Arelma/PNB appealed from the Judgment, as did various other claimants, including Republic of the Philippines (“Republic”) and its Presidential Commission on Good Government (“PCGG”) (defendants who had been dismissed prior to

1 judgment following their assertion of sovereign immunity) and the Estate of Roger
2 Roxas and Golden Budha Corporation (“Roxas/Golden Budha”). The three appeals
3 were consolidated. Arelma/PNB moved the Court of Appeals for a stay of
4 distribution of the interpleaded assets pending appeal. The parties then stipulated
5 that the assets would be held by the District Court and would not be distributed
6 until after disposition of the appeals.
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9 The Judgment was initially affirmed by an opinion of the Court of Appeals
10 filed in May 2006 and its Judgment entered in September 2006. The PCGG filed a
11 Motion for stay of execution of the Judgment in the Ninth Circuit, which on
12 June 22, 2006 issued an Order granting that motion and ordering that the District
13 Court “... shall not transfer, distribute or otherwise dispose of any portion of the
14 funds that are the subject of this interpleader action, nor shall any party to this
15 action seek any such transfer, distribution or distribution, until the issuance of the
16 mandate by this Court.” A copy of the Court of Appeals’ Order is attached as
17 Exhibit 1.
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20 Both Arelma/PNB and the Republic/PCGG filed petitions for writs of
21 *certiorari* in the United States Supreme Court. The Supreme Court granted
22 *certiorari* and on June 12, 2008 issued its Opinion in *Republic of the Philippines v.*
23 *Pimentel*, 76 U.S.L.W. 4445 (U.S. June 12, 3008). A copy of the Slip Opinion is
24 attached as Exhibit 2. The Court held that in affirming the District Court’s
25 Judgment the Court of Appeals erred in its indispensable party analysis under Rule
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1 19(b) by “not giving the necessary weight to [the Republic/PCGG’s] assertion of
2 sovereign immunity”. (Slip Opinion, p. 11.) Based on this error and its further
3 analysis of Rule 19(b), the Court concluded “the action must be dismissed.” (Slip
4 Opinion, p. 20.) Thus, the Supreme Court’s disposition was as follows:

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7 The judgment of the Court of Appeals for the Ninth
8 Circuit is reversed, and the case is remanded with
9 instructions to order the district court to dismiss the
interpleader action. (Slip Opinion, p. 20.)

10 Consistent with this order on August 4, 2008 the Court of Appeals issued its
11 mandate ordering that “the district court of the District of Hawaii is directed to
12 dismiss the interpleader action.” That Order, a copy of which is attached as
13 Exhibit 3, was filed in the District Court on August 8, 2008. This Court then set a
14 Status Conference for September 10, 2008 for the “filing and spreading” of the
15 Court of Appeals’ mandate.
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18 Based on the foregoing, any further proceedings in this Court should not be
19 controversial. The Court of Appeals’ mandate is clear and specific: this Court is
20 “directed to dismiss the interpleader action.” The rule of mandate requires district
21 courts to follow the orders of the appellate court. Specifically, a district court
22 cannot refuse to dismiss a case when the mandate requires it. (*See U.S. v. Cote* (9th
23 Cir. 1995) 51 F.3d 178, 181.) Indeed, the rule of mandate is jurisdictional. (*U.S. v.*
24 *Thrasher* (9th Cir. 2007) 483 F.3d 977, 981-982.) In executing the mandate the
25 district court “... cannot vary it, or examine it for any other purpose than execution;
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1 ... But the [district court] may consider and decide any matters left open by the
2 mandate...” *In re Sanford Fork & Tool Co.* (1895) 160 U.S. 247, 255-256.

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4 However, any post-mandate conduct of the lower court cannot be “inconsistent with
5 either the spirit or express terms of our decision.” (*Quern v. Jordan* (1979) 440
6 U.S. 332, 347 n. 18.)

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8 It follows that the only matter left open after a dismissal of this interpleader
9 is to direct the return to Merrill Lynch of the interpleaded assets it deposited with
10 the Clerk of this Court. With a dismissal of the action there is no reason for the
11 Clerk to retain custody of the assets and there is no other party to whom the assets
12 can conceivably be delivered other than Merrill Lynch who had possession of them
13 immediately prior to the filing of the action and who deposited them with the Clerk
14 for purposes of its interpleader. (see 28 U.S.C. § 1335(a)(1).) Where an
15 interpleader action is dismissed, the district court must direct the clerk to return the
16 deposit to the interpleading party. (*Francis I. du Pont & Co. v. O’Keefe* (7th Cir.
17 1966) 365 F.2d 141, 143.) Here, any disposition of the assets other than to return
18 them to Merrill Lynch would be contrary to the Supreme Court’s decision, which
19 confirmed that the District Court had no power to dispose of them in the absence of
20 the Republic/PCGG.
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22 Notwithstanding the dismissal of this action and return of the assets to
23 Merrill Lynch, Arelma/PNB continues to assert their claim to those assets on the
24 same grounds that they have throughout the course of this litigation. Specifically,
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1 the position of Arelma/PNB that the assets be returned to Merrill Lynch is without
2 prejudice to their claim to the assets.
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4 DATE: Honolulu, Hawaii, August 28, 2008.
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6 /s/ Carol A. Eblen

7 JAY R. ZIEGLER

8 BARRY A. SMITH

9 CAROL A. EBLEN

10 Attorneys for Defendants

11 ARELMA S.A. and PHILIPPINE

12 NATIONAL BANK
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